

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.185 OF 2006

Damayanti Victor Monteiro & Ors. ...Petitioners

Versus

Sudha Banvarilal Tiwari ...Respondent

Shri R.A.Thorat for the Petitioners.

Shri S.S.Redekar for the Respondent.

**CORAM : ABHAY S.OKA, J.
DATED : MARCH 26, 2007.**

ORAL JUDGMENT:

1. Rule. Advocate for the Respondent waives service. Taken up for hearing forthwith.

2. The Petitioners are the original Plaintiffs who filed a suit for eviction against the Respondent in respect of the suit premises being Room No.3 in a chawl at Bhandup, Mumbai. The suit was decreed exparte. A notice was taken out by the Respondent for setting aside the decree. The learned Judge of the Small Causes Court at Mumbai by order dated 09th November, 2005, dismissed the notice on the ground that the Respondent ought to have preferred an Appeal against the exparte decree as after service of writ of summons, the Respondent failed to appear in the Court and to file written statement. An Appeal was preferred by the Respondent before the Appeal Bench of the Court of Small Causes. By the

impugned Judgment and Order dated 30th and 31st August, 2006, the Appeal Bench of Small Causes Court allowed the said Appeal and made the notice taken out by the Respondent absolute subject to payment of costs by the Respondent to the Petitioners. The Appeal Bench also passed an order directing the Petitioners to restore the possession of the suit premises in favour of the Respondent.

3. The learned counsel appearing for the Petitioners submitted that the learned Trial Judge has rightly held that the decree passed against the Respondent cannot be said to be an *ex parte* decree within the meaning of Rule 6 of Order IX of the Code of Civil Procedure, 1908. He submitted that the trial Court was right in holding that an Appeal ought to have been preferred by the Respondent against the decree. He submitted that even otherwise no case was made out for setting aside the *ex parte* decree as the Respondent herself was negligent. Without prejudice to the aforesaid submissions, he submitted that the Appeal Bench could not have passed the order of restitution as the power to pass such an order vests in the court of the first instance.

4. The learned Advocate for the Respondent opposed

the Revision Application by pointing out that the Appeal Bench has rightly held that the decree was neither under Rule 5 nor under rule 10 of Order VIII of the said Code and the decree was an exparte decree which could have been set aside on an Application under Rule 13 Order IX of the said Code. He submitted that the restitution under section 144 of the said Code is a matter of right and therefore, no interference is called for with the direction given by the Appeal Bench.

5. I have considered the submissions. The trial Court held that the decree passed in favour of the Petitioners was under Rule 5 and 10 of Order VIII of the said Code and therefore, in view of the settled law, the decree cannot be set aside by invoking Rule 13 Order IX of the said Code. The Appeal Bench has relied upon a decision of this Court in the case of **Gaurang V. Merchant and others Vs. Madhilso and Company Private Limited and Others (2004(5) Bombay C.R. Page 70)**. The Appeal Bench referred to the fact that decree was not passed by the trial Court only on the ground of default of filing written statement. In fact, the Petitioners filed an affidavit of examination-in-chief and led the evidence. That is the reason why the Appeal Bench, in my view, rightly held that the decree passed by the trial Court was neither under Rule 5 of Order VIII nor

under Rule 10 of Order VIII of the said Code. The Appeal Bench found that several issues including issue regarding maintainability of the suit filed by the Petitioners have been raised by the Respondent. For the reasons recorded the Appeal Bench has set aside the exparte decree. Exparte decree relates to possession of a residential premises.

6. It cannot be said that the impugned order is perverse or illegal in so far as order of setting aside exparte decree is concerned.

7. The Appeal Bench has passed an order directing the restoration of possession. My attention has been invited to a decision of the Apex Court in the case of **State Bank of Saurashtra Vs. Chitranjan Rangnath (AIR 1980 Supreme Court Page 1528)**. My attention is also invited to a decision of the learned single Judge of this court in the case of **V.T. Hundlani Vs. R.C.Kenny (1996(3) ALL MR Page 222)**.

8. In the case before the learned single Judge of this court, an exparte decree passed for possession was set aside by the Appellate Court. The Appellate Court also passed an order for restitution. Relying upon the decision of the Apex Court in the case of State Bank of

Saurashtra (supra) the learned single Judge of this Court held that an order under section 144 of the said Code can be made only by the Court of first instance even if the decree is set aside either in Appeal or in Revision. Therefore, the learned single Judge held that the direction given by the Appellate Court of restitution was illegal. The learned Advocate for the Respondent placed reliance on a decision of another learned single Judge of this Court in the case of **Somnath Vs. Narhar (2004(1) Maharashtra Law Journal Page 1117)**. Perusal of the said decision shows that the issue regarding power of Appellate Court to order restitution while setting aside exparte decree did not arise for consideration of the learned single Judge. Therefore, the said decision will not help the Respondent. In the circumstances, the direction given for restoration of possession will have to be set aside with liberty to the Respondent to take out appropriate proceedings under section 144 of the said Code before the court of first instance.

9. Hence, I pass the following order:

- (i) Following part of the operative part of the impugned order is quashed and set aside:

". The Plaintiffs are hereby directed to restore possession of the suit premises viz Room No.3, Chawl No.C, Kamala Niwas, Quarry Road, Behind Mangatram Petrol Pump, Bhandup (West), Bombay 400 078, to the Defendant on or before 30th September, 2006". page 78.

- . However, it will be open for the Respondent to take out appropriate proceedings before the Court of first instance under section 144 of the Code of Civil Procedure, 1908.
- (ii) Rest of the order passed by the Appeal Bench is confirmed.
- (iii) Considering the fact that the original suit is of the year 2003 in which one of the grounds is bonafide requirement, the learned trial Judge will give priority to the suit and the same shall be disposed of as expeditiously as possible and preferably on or before 30th June, 2008.
- (iv) All contentions of the parties on the merits of the suit are expressly kept open.

(v) There will be no orders as to costs.

JUDGE